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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 725

IN THE MATTER OF
MARATHON FOUNDRY AND MACHINE COMPANY, A CORPORATION, DEBTOR,

Petitioner,

vs.

JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY AND MACHINE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Marathon Foundry and Machine Company, a corporation, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on December 22, 1955.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, as of the date hereof, has not been

officially reported. The opinion, however, is printed in full in Appendix A, pages 17 to 25, and is contained in the certified copy of the record.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 22, 1955. (Appendix B, page 26, and certified record.)

A petition for rehearing was filed by the petitioner and on January 18, 1956, the United States Court of Appeals entered an order denying said petition for rehearing. (Appendix C, page 27, and certified record.)

The jurisdiction of this court is invoked by petitioner under Title 28, U. S. C., Section 1254(1).

QUESTION PRESENTED.

Whether a court of bankruptcy in a proceeding for corporate reorganization under Chapter X of the Bankruptcy Act may order the sale or liquidation of a substantial and major asset of the debtor, where such asset is not of a perishable nature, where no plan of reorganization has been filed, and where no emergency exists requiring a sale to avoid the loss of said asset.

STATUTE INVOLVED.

Section 116(3) of the Bankruptcy Act; 11 U. S. C., Section 516(3):

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers and duties in this chapter conferred and imposed upon him and the court
>
> * * * * *
>
> "(3) Authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may pre-

scribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;"

Section 216(10) of the Bankruptcy Act; 11 U. S. C., Section 616(10):

"A plan of reorganization under this chapter

* * * * *

"(10) shall provide adequate means for the execution of the plan, which may include * * * the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein; * * *".

STATEMENT OF THE CASE.

On April 30, 1953, an involuntary petition in bankruptcy was filed against the petitioner in the United States District Court, for the Northern District of Illinois, Eastern Division (hereinafter referred to as the "District Court") (R. 2). On May 20, 1953, petitioner filed its petition for reorganization under Chapter X of the Bankruptcy Act, which petition was approved as having been filed in good faith (R. 2). Thereafter, trustees were appointed in the reorganization proceeding (R. 2).

The assets of the petitioner consisted of: (a) Manufacturing plant located at Wausau, Wisconsin, which was appraised by the trustees at $294,019; (b) machinery, equipment, tools and inventory located at the Wausau, Wisconsin, plant, appraised by the trustees at $247,000 (R. 52); and (c) 32,126 shares of the capital stock of Bethlehem Foundry & Machinery Co. (hereinafter referred to as "Bethlehem") (R. 55-56). In addition, there is on deposit with the Chicago Title and Trust Company approximately $165,000 to insure the payment of certain

tax and lien claims (R. 58), a small amount of cash which at April 30, 1955 amounted to $13,000 (R. 57) and controversial claims of the petitioner (R. 58).

Of the machinery, equipment, tools and inventory aforesaid, machinery having an appraised value of approximately $114,000 was sold by the trustees upon return of bids in open court for $85,100 (R. 54); and machinery and equipment with an appraised value of $133,000 was leased to Wausau Manufacturing Co. pursuant to order of court (R. 54). The manufacturing plant of the petitioner was leased to Wausau Manufacturing Co. by the trustees for a three-year period commencing May 1, 1954. The trustees in their report to the court filed May 2, 1955 stated as follows:

> "There also exists the possibility that a lease for a longer term may be negotiated" (R. 60).

The disposition of the petitioner's property by sale and lease was not pursuant to any plan of reorganization, no plan having been suggested to the court.

On March 14, 1954, the District Judge, pursuant to the petition of the trustees for instructions (R. 4, *et seq.*), entered an order to show cause why the aforesaid shares of stock of Bethlehem should not be sold to Metals Disintegrating Company, Inc. for $25.00 per share, or to any higher bidder (R. 13-14); the order also appointed an appraiser for the shares.

On April 22, 1955, the petitioner filed objections to the proposed sale, stating as follows (R. 18):

> "1. No Plan of Reorganization has been approved by the Court in the present proceedings.
>
> "2. The shares of stock proposed to be sold by the Trustees herein represent the principal asset of the Debtor. The facts alleged in the Petition of the Trustees do not disclose the existence of any emergency to

justify the sale of said shares of stock otherwise than in pursuance of a Plan of Reorganization.

"3. The sale of these said shares of stock will make impossible the reorganization of the Debtor."

At the hearing held April 25, 1955, upon the return of the show cause order, before the Referee in Bankruptcy acting as a special Master, the appraiser testified that the shares had a fair market value of $775,521.64 (R. 26). An offer was there made by Intelectron, Inc. of approximately $910,000 for the petitioner's shares in Bethlehem (R. 35). The petitioner filed its objections to any sale, stating *inter alia* (R. 62):

> "If said stock is sold no Plan of Reorganization would be feasible because the main asset of the Debtor would be sold, and the Debtor would be left with a plant and machinery and equipment which are entirely leased out to Borg-Warner for a period of time, pursuant to orders of Court heretofore entered in these proceedings";

and in amended objections, petitioner stated (R. 66):

> "If said stock is sold no Plan of Reorganization would be feasible because the main asset of the Debtor would be sold, and the Debtor would be left with a plant and machinery and equipment which are entirely leased out to Wausau Manufacturing Company, a subsidiary of Borg-Warner, pursuant to orders of Court heretofore entered in these proceedings, for a term of three years commencing May 1, 1954, with the option on the part of the lessee to cancel same on April 30, 1956. • • •
>
> "The sale of the stock would be a step in the liquidation in installments of the property of Debtor, contrary to the purpose and intent of Chapter X of the Bankruptcy Act (*In re Solar Manufacturing Corporation,* 176 Fed. 2nd 493)."

On May 27, 1955 the District Judge entered an order *nunc pro tunc* May 9, 1955, accepting the bid of Intelectron,

Inc. and ordering the trustees to sell the Bethlehem shares to Intelectron, Inc. The order further provides that the sale shall not be consummated in any of the following events:

> (a) That if there shall have been filed with the trustees suggestions or proposals for a Plan by May 20, 1955 which, if approved, will assure a greater return than the bid of Intelectron, Inc. and a cash deposit sufficient to indemnify the estate against loss if the Intelectron bid is lost or withdrawn; or
>
> (b) If the debtor by May 20, 1955, or such other date fixed by the judge, deposits sufficient cash to pay all debts including costs of administration; or
>
> (c) The trustees, by July 20, 1955, shall have filed their Plan providing for retention or other disposition of the shares.

(R. 96, 97 and 98). The order contains no finding of emergency necessitating the sale, nor was evidence adduced in respect thereof. On appeal, the Court of Appeals affirmed the order of the District Judge.

REASONS FOR GRANTING THE WRIT.

The Decision of the Court of Appeals Is in Conflict With Applicable Decisions of This Court and of Other Courts of Appeal.

The problem presented is of major importance in the field of bankruptcy administration and particularly in corporate reorganization under Chapter X of the Bankruptcy Act, 11 U. S. C. Sec. 501 *et seq.* and is one which will inevitably continue to recur. The decision of the Court of Appeals for the Seventh Circuit is in conflict with applicable decisions of this Court and of the Courts of Appeal for the Second and Third Circuits on the same matter. Such conflicting views affecting important questions of the construction of Chapter X and of bankruptcy administration ought not to be left in doubt.

Chapter X contemplates rehabilitation and not liquidation. The purpose of a Chapter X proceeding is to maintain going concern values and to readjust a business life so that it can continue and not to dismember the debtor by a liquidation which is not pursuant to a plan. *In re Solar Mfg. Corp.* (C. A. 3, 1949), 176 F. 2d 493, 494.

This court in affirming the dismissal of a Chapter X proceedings in *Fidelity Assurance Association* v. *Sims* (1942), 318 U. S. 608, for the reason that the petition had not been filed in good faith in that there was no prospect that the debtor could be reorganized, held that Congress did not intend resort to Chapter X to be had for the mere purpose of liquidation and stated at page 621:

> "The scheme of the chapter precludes any such conclusion. The mandate of Sec. 144 is clear that unless the judge is satisfied the petition was filed in good faith he must dismiss it. Under the predecessor of Chapter X,—Sec. 77(b) of the Bankruptcy Act,—the district judge was given authority, by subsection (c) (8), under certain circumstances, to 'direct the estate to be liquidated, or direct the trustees to liquidate the estate * * *.' In Chapter X, on the other hand, Sec. 236(2) provides that if no plan is approved or accepted, or if it is not consummated, the judge may, after hearing all persons in interest, adjudge the debtor a bankrupt or dismiss the proceedings as he may decide is in the interest of creditors and stockholders. Thus the statute does not contemplate a liquidation in a Chapter X proceeding but a liquidation in ordinary bankruptcy or a dismissal outright."

and at page 622:

> "Congress did not intend a Chapter X case to be turned into a liquidation proceeding at the outset, but intended the litigation to become a straight bankruptcy only after the failure to consummate a plan, and meant to limit the parties to their remedy in ordinary bankruptcy in all other cases."

Albeit this court has held that the statute does not contemplate a liquidation in a Chapter X case, the Courts of Appeal for the Second, Third and Seventh Circuits have not permitted the decision to impede a trend toward liquidation in reorganization proceedings. The decision of this court is held to be only a precedent for the question of good faith as of the time of filing the petition for reorganization under Chapter X.

Sales Pursuant to Plan Under Chapter X.

The Courts of Appeal have held that a plan of reorganization may provide for the sale of all of the debtor's property, and the distribution of the proceeds to its creditors. Thus the Court of Appeals for the Second Circuit in *Country Life Apartments* v. *Buckley* (1944), 145 F. 2d 935, relying on Section 216(10) of the Bankruptcy Act, 11 U. S. C. Sec. 616(10), as its authority, approved a plan providing for the sale of all of the assets of the debtor. To like effect is the decision of the Court of Appeals for the Seventh Circuit in *In re Lorraine Castle Apartments Bldg. Corporation* (1945), 149 F. 2d 55. The Court of Appeals for the Second Circuit in *Patent Cereals* v. *Flynn* (1945), 149 F. 2d 711, extended the rule and held that where there has been a sale of the debtor's assets prior to the submission of a plan, Section 216(10) nevertheless permits of a plan concerned only with distribution of the proceeds. That court, in considering the question of liquidation under a plan, in *In re Pure Penn Petroleum Co.* (1951), 188 F. 2d 851, 854, stated:

> "Section 216(10), applicable to a Chapter X proceeding, provides that a plan may authorize the sale of all the assets 'at not less than a fair upset price' and the distribution of the proceeds among the creditors. Although *Fidelity Assurance Ass'n* v. *Sims*, 318 U. S. 608, 63 S. Ct. 807, 87 L. Ed. 1032, throws some

> doubt on the scope of that section, the *Sims* case has been held to authorize a sale in pursuance of a Chapter X plan, at least where the original Chapter X petition was filed in good faith."

From the foregoing, it appears that the Courts of Appeal have approved liquidations in Chapter X proceedings pursuant to a plan under Section 216(10).

Sales in Chapter X Proceedings in the Absence of a Plan.

Absent a plan of reorganization, may a liquidation be effected by order of court? Section 116(3) of the Bankruptcy Act; 11 U. S. C. Sec. 516(3), provides:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court— * * *
>
> "(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;"

When, under Section 116(3) does the court have power to authorize a trustee *upon cause shown* to sell the property of the debtor? To prove "cause" for a sale under Section 116(3) it is necessary to show that the assets are in effect perishable. The sale is confined to emergencies where there is imminent danger that the assets will be lost if prompt action is not taken.

In *In re V. Loewer's Gambrinus Brewery Co.* (1944), 141 F. 2d 747, the Court of Appeals for the Second Circuit affirmed an order of the District Court approving the sale for cash of virtually all the income-producing property of the debtor outside the plan of reorganization, but pointed out specifically that the order of sale was made upon the finding that the property sold was perishable, and would

deteriorate excessively in a short period of time when the brewery was not being operated.

In re Solar Mfg. Corp. (1949), 176 F. 2d 493, involved the sale of virtually all the assets of the debtor, not in pursuance of a reorganization plan. The Court of Appeals for the Third Circuit held that the sale of the entire assets of a debtor in reorganization is a proper part of a Chapter X proceeding when the sale is made pursuant to a plan.

The Court stated at pages 494-495:

> "We think that sales under court order not in pursuance of a reorganization plan are to be confined to emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken. * * * But we do not think that in the ordinary case the elaborate protective provisions of Chapter X are to be short circuited by a trustee's sale on court order without going through the usual statutory procedure. The decisions under the section involved in Chapter X bear out this view." (Citing *In re Loewer's Gambrinus Brewery Co., Inc.*, 2 Cir., 1944, 141 F. 2d 747).

That the Court of Appeals for the Second Circuit is committed to the emergency doctrine of the *Solar* case, is demonstrated in *In re Pure Penn Petroleum Co.* (1951), 188 F. 2d 851. There the debtor presented an arrangement under Chapter XI to sell all its assets, and with the proceeds to make payment to its creditors. Over a creditor's objection, the District Court confirmed the arrangement and sale. The creditor appealed from the order of sale. Although *Pure Penn* involved a Chapter XI arrangement, the Court of Appeals compared Section 313(2) of Chapter XI, 11 U. S. C. Sec. 713(2), to corresponding Section 116(3) of Chapter X, and stated at page 854:

> "Under Chapter XI, a sale of all the debtor's assets may be authorized, pursuant to Sec. 313(a), 11 U. S. C. A. Sec. 713(2), only 'upon cause shown.' This

section is worded the same as Sec. 116(3), 11 U. S. C. A. Sec. 516(3), relative to such a sale in a Chapter X proceeding. It has been held that to prove 'cause' for a sale under Sec. 116(3) it is necessary to show that the assets are, in effect, 'perishable'; such a sale must 'be confined to emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken.' *In re Solar Mfg. Corp.*, 3 Cir., 176 F. 2d 493, 494. See also *In re V. Loewer's Gambrinus Brewing Co., Inc.*, 2 Cir., 141 F. 2d 747, 748, * * *."

The *per curiam* opinion of the Court of Appeals for the Second Circuit in *Frank* v. *Drinc-O-Matic, Inc.* (1943), 136 F. 2d 906, holding that when a petition in a Chapter X proceeding has been approved, the court has power under Sec. 116(3) to sell any property of the debtor upon such terms and conditions as the judge may approve, must be restricted in the light of the later limited holding of the same court in *Loewer's Gambrinus* and *Pure Penn.*

The Decision of the Courts Below.

The Court of Appeals for the Seventh Circuit in affirming the order of sale by the District Court grounded its decision solely on the authority of the Court of Appeals for the Second Circuit in *Drinc-O-Matic.* It did not consider the decision of this court in *Fidelity Assurance Association* v. *Sims,* nor the subsequent cases of the Courts of Appeal for the Second and Third Circuits hereinbefore cited. The record in the instant case (R. 57) shows that the Bethlehem stock ordered to be sold constitutes a substantial and major asset of the debtor. The sale was not in pursuance of a reorganization plan under Section 216(10). In such circumstances, a sale pursuant to Section 116(3), under the doctrine of the above cited cases, could only be had upon a finding of an emergency in that

the asset was in effect perishable, and there was danger of its loss if prompt action was not taken. The Trustees' petition for instructions regarding the sale of the Bethlehem stock (R. 4-7) did not allege the existence of an emergency involving imminent danger of loss of the stock if it were not promptly sold. The Trustees in the hearings before the Referee did not prove the existence of any emergency. The order of the District Court (R. 96-97) did not make any findings of fact, based upon evidence, supporting the conclusion that an emergency existed and that "cause" had been shown.

The question of whether an emergency existed was before the court. The debtor in written objections to the proposed sale of the stock stated (R. 18):

> "2. The shares of stock proposed to be sold by the Trustees herein represent the principal asset of the Debtor. The facts alleged in the Petition of the Trustees do not disclose the existence of any emergency to justify the sale of said shares of stock otherwise than in pursuance of a Plan of Reorganization."

The following statement of the court in *In re Pure Penn Petroleum Co.* (C. A. 2) 188 F. 2d 851, 854, is particularly applicable:

> "The debtor here, therefore, was obliged to allege and had the burden of proving the existence of an emergency involving imminent danger of loss of the assets if they were not promptly sold. The petition for sale fell far short of alleging such facts. Nor is there a finding of fact, based upon evidence, supporting the conclusion that 'cause' had been shown. Such a finding is required."

Despite the statement contained in their report filed May 2, 1955, that:

> "Trustees are of the opinion that the best interest of this estate and the creditors thereof require the continued operation of the business of the Debtor" (R. 60),

the record in this case discloses a piecemeal liquidation under the guise of a Chapter X reorganization. The debtor brought this fact before the District Court in its amended objections to the proposed sale of the Bethlehem shares when it stated as follows:

> "d. The sale of the stock would be a step in the liquidation in installments of the property of Debtor, contrary to the purpose and intent of Chapter X of the Bankruptcy Act (*In Re Solar Manufacturing Corporation,* 176 Fed. 2nd, 493)." (R. 66.)

The debtor's machinery having an appraised value of $114,000 has already been sold, not at auction, but on a return of bids in open court (R. 54). The remainder of debtor's physical assets consisting of its plant and equipment located at Wausau, Wisconsin, are leased to Wausau Manufacturing Company pursuant to orders of the District Court for a term of three years from May 1, 1954 with the option of lessee to cancel on April 30, 1956. (R. 54, 55, 60 and 66.)

To convert a Chapter X reorganization proceeding into a piecemeal liquidation is proscribed by the act, by the decision of this court in *Fidelity Assurance Association* v. *Sims,* 318 U. S. 608, and the authorities herein cited.

The decision of the Court of Appeals for the Seventh Circuit conflicts with the decisions in similar situations of the Courts of Appeal for the Second and Third Circuits and with the decision of this court in *Fidelity Assurance Association* v. *Sims.*

To sustain the action of the courts below is to permit a liquidation under Chapter X as in cases of straight bankruptcy without the safeguards pertaining to liquidation of assets in straight bankruptcy proceedings.

Abuse of Discretion.

The Court of Appeals labored under the erroneous impression that it could not reverse unless it was found that the District Court had abused its discretion. There is not here involved the question of whether the District Court abused its discretion in authorizing the sale, or whether the Court of Appeals should substitute its discretion for that of the District Court. As the Court of Appeals for the Third Circuit stated *In re Solar Mfg. Corp.*, 176 F. 2d, 493, 495:

> "If this were all there were to the case, however, it would be a serious question whether we would be justified in saying no to a business transaction urged by the trustees and satisfactory to the court. In the view we take of the case, however, we are not substituting our discretion for theirs. We are saying that the safeguarding provisions of Chapter X are not to be ignored in the sale of the assets of a business unless an emergency exists. We do not think that the facts of the present case present such an emergency as justifies the short-cut proposed to be taken."

CONCLUSION.

The courts below in permitting a sale of the major and principal asset of the debtor in a proceeding under Chapter X of the Bankruptcy Act, in the absence of a Plan of Reorganization and in the absence of any showing or finding of emergency for such sale, have construed the provisions of the Bankruptcy Act contrary to the decisions of the Courts of Appeal of other circuits and contrary to the decision of this court in *Fidelity Assurance Association* v. *Sims*. It is imperative that this court review the decision of the Court of Appeals for the Seventh Circuit, which so vitally affects the administration of estates in reorganization.

It is submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACOB COHEN,
Counsel for Petitioner.

J. H. SCHWARTZ,
IRA S. KOLB,
Of Counsel.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11534. OCTOBER TERM, 1955—OCTOBER SESSION, 1955.

In the Matter of
MARATHON FOUNDRY AND MACHINE COMPANY, A CORPORATION, DEBTOR.
MARATHON FOUNDRY AND MACHINE COMPANY,
Debtor-Appellant,
vs.
JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, Trustees of Marathon Foundry & Machine Company, a corporation,
Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 22, 1955.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Debtor has appealed from an order of the district court entered May 27, 1955, directing appellees to sell, for $910,129.58, to Intelectron, Inc. 32,126 shares of the capital stock of Bethlehem Foundry & Machine Co., a Pennsylvania corporation, which stock is an asset of debtor, but which is subject to liens aggregating $500,000 more or less.

An involuntary petition in bankruptcy was filed against debtor on April 30, 1953. Debtor filed its voluntary peti-

tion for reorganization under chapter X of the bankruptcy act[1] on May 20, 1953. Said petition was approved as filed in good faith and thereafter appellees were appointed trustees in the reorganization proceedings. In addition to its Bethlehem stock, debtor's assets consisted of a manufacturing plant and equipment at Wausau, Wisconsin[1a], controversial claims against various individuals and indirectly against the United States aggregating about $350,000, and thereafter a fund of approximately $165,000 held by Chicago Title and Trust Company, pursuant to order of court, to insure payment of certain tax and lien claims, and a small amount of cash accumulated by the trustees as a result of the operation of the debtor. The Bethlehem holdings constitute about 70 per cent of Bethlehem's outstanding stock.

On March 14, 1955, the trustees filed a petition in the district court, requesting instructions. At that time no plan of reorganization had been filed. They advised the court that it would be to the best interests of all parties that the Bethlehem stock be sold to the best and highest bidder; that they had no funds with which to redeem the stock, which was held by secured creditors; that such sale would make it possible to pay such secured creditors in full and to realize an additional sum to assure the general creditors a substantial amount, while still leaving the other assets of the debtor to be the subject of a plan of reorganization. The trustees further represented that they had been able to obtain an offer of about $800,000 for said stock, free and clear of any lien.

On March 14, 1955, the district court entered an order that all parties in interest show cause why such sale should not be made. The court by said order also ap-

1. 11 U. S. C. A., § 501 *et seq.*

1a. Subject to a lease, expiring April 30, 1957, executed by the trustees pursuant to order of the court below.

pointed an appraiser to fix the value of the Bethlehem stock, and called for bids.

The district court on April 1, 1955 ordered, *inter alia* that the trustees should file by July 20, 1955 a plan of reorganization or report their reasons why a plan could not be effected.

On April 22, 1955, the debtor, "by Jacob Dyner," filed written objections to the proposed sale of the Bethlehem stock on the following grounds: (1) no plan of reorganization had been approved, (2) the stock was the principal asset of the debtor and there was no showing of any emergency to justify its sale otherwise than in pursuance of a plan of reorganization, and (3) said sale would make impossible the reorganization of the debtor.

On April 25, 1955 the appraiser fixed the value of the stock at $775,521.64.

Pursuant to notice a referee in bankruptcy, beginning April 25, 1955, heard evidence in support of and against the petition, and on that day bids were received, the highest and best bid being that of Intelectron, Inc., for $910,129.58.

By an amended objection debtor submitted at the adjourned referee's hearing of May 9, 1955 a letter from A. J. Armstrong Co. It was dated April 20, 1955, and addressed to Jacob Dyner who, according to the letter, had represented to Armstrong that he was the sole owner of all outstanding Marathon stock. By this letter Armstrong offered to make a loan to Marathon in a sum not to exceed $975,000, to "be evidenced by a promissory note of Marathon and other instruments and agreements containing such terms, conditions, interest rates and maturity as shall be mutually agreeable to you, Marathon, and Armstrong." It was conditioned, *inter alia,* on an undertaking by Marathon to pledge its Bethlehem stock on the loan. The letter bore the notation "the foregoing agree-

ment is hereby accepted:" followed by Dyner's signature. Debtor informed the court of a later telegram to Dyner from Armstrong, which said: "Such loan to be made by Armstrong shall be evidenced by a promissory note of Marathon, and by the usual form of loan and security agreement—."

Both the referee and the district court overruled the objections filed by the debtor. By order of May 27, 1955 (entered *nunc pro tunc* as of May 9, 1955), which is the order appealed from, it was provided, *inter alia*, that the said stock should be sold unless (a) suggestions for a plan assuring to the estate and creditors thereof a greater return than the bid of Intelectron, Inc., with security for the consummation thereof, were filed by June 24, 1955[2]; or, (b) there shall have been deposited by May 20, 1955, sufficient funds to discharge all of the debts of the debtor and costs of administration; or (c) the trustees shall have filed by July 20, 1955, their plan of reorganization providing for retention or other disposition of the Bethlehem stock.[3] None of these events has occurred.

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2. This time was extended until July 11, 1955 on motion of the debtor.

3. The order of May 27, 1955 contains findings, including the following:

> "That Metals Disintegrating Co., a corporation, has heretofore made an offer to purchase said 32,126 shares of Bethlehem Foundry & Machine Co. stock for $25.00, per share; that said offer was accompanied by an earnest money deposit of $50,000;
>
> That various other competitive bids were made at said hearing, the highest and best bid being that made by Intelectron, Inc., for $28.33, per share, which produced a total offer of $910,129.58; that said offer was made in writing, subject to certain conditions and limits in time for final consummation to September 1st, 1955; that said offer was accompanied by a certified check delivered to the trustees in the sum of $50,000;
>
> That trustees herein have stated, in their opinion, the conditions contained in the offer of Intelectron, Inc., can be fulfilled;
>
> • • • • •
>
> That it appears that the debtor has a substantial equity in

The only plan presented was that filed by the trustees on July 20, 1955. Said plan recognized the sale of the 70 per cent interest in Bethlehem to Intelectron, Inc., for the sum of $910,129.58, and provided for the use of the equity derived therefrom, and for the placing of the remainder of the assets of the debtor in a new company to be formed. No court action appears to have been taken on this plan.

On July 28, 1955, the district court entered an order finding that no plan had been filed by any one but the trustees, and again directing the trustees to consummate the sale of Bethlehem stock to Intelectron, Inc. for the sum of $910,129.58, in accordance with the order of May 27, 1955.

Intelectron, Inc. has agreed to extend the date of consummation of the sale until December 31, 1955.

In this court debtor contends: (1) in the absence of an emergency, a bankruptcy court may not order the sale of the principal asset of the debtor unless made in pursuance of a plan of reorganization; (2) to authorize such sale, the court must find as a fact based upon evidence that an emergency existed involving imminent danger of

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said Bethlehem stock which will become available upon sale for either distribution or for a plan of reorganization;

That it is in the best interests of the estate herein that said stock in Bethlehem Foundry & Machine Co. be sold upon the terms and conditions hereinafter set forth to Intelectron, Inc., for the sum of $28.33, per share;

That June 24, 1955 has been fixed as the date by which creditors or stockholders may submit to the trustees suggestions for the formulation of a plan, or proposals in the form of plans;

That it is in the best interests of this estate and the creditors thereof that the benefits attainable by the acceptance of the offer of Intelectron, Inc., be not lost because of the failure of parties herein to propose a fair and equitable plan which will insure, upon approval, acceptance and confirmation to the creditors of this estate, at least as great a return as the offer of Intelectron, Inc., will produce."

loss of the assets if the sale be not consummated; (3) the primary duty for the formation of a plan of reorganization rests with the trustees under chapter X proceedings; and (4) the primary purpose of reorganization proceedings is to effect reorganization of the debtor—not to liquidate its assets.

1. On oral argument before us, debtor's counsel emphatically asserted that the district court lacked power to authorize and approve the sale of the Bethlehem stock to Intelectron.

Included in chapter X, dealing with corporate reorganizations, are several pertinent provisions.

Section 111[4] provides:

> "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Section 126[5] provides:

> "A corporation * * * may * * * file a petition under this chapter."

Section 115[6] provides:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

Section 116[7] provides:

> "Upon the approval of a petition, the judge may, in

4. 11 U. S. C. A., § 511.
5. *Ibid*, § 526.
6. *Ibid*, § 515.
7. *Ibid*, § 516.

addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court—* * * authorize * * * a trustee * * *, upon such notice as the judge may prescribe and upon cause shown, to * * * sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve".

The question of the power of the district court to order the sale must be resolved in the light of the circumstances existing in this case on May 9, 1955. At that time no plan of reorganization of debtor had been submitted to the court by anyone. The Bethlehem stock was owned by debtor but was not used in the conduct of its business, the revenue of which was derived from a factory under lease expiring April 30, 1957. The stock was severally held as collateral security by Louis Dreyfuss, Morris Wolf and Albert J. Grosser Co. We were told upon oral argument by Dreyfuss' counsel that Dreyfuss is entitled to accruing interest at a rate which, his counsel says, is a matter of dispute, either 8 per cent per annum as Dreyfuss contends, or 6 per cent per annum as the trustees contend. On May 9, 1955 the amount due to Dreyfuss was about $226,000, the amount then due Grosser was about $240,000 and the amount due Wolf was about $58,000. The trustees had not sufficient funds with which to redeem the pledged stock.

Under these circumstances, we hold that the district court had power, under the statutory provisions above quoted, to enter the order from which an appeal has been taken. *Frank* v. *Drinc-O-Matic,* 136 F. 2d 906.

2. The district court, having power to order the sale of the Bethlehem stock belonging to the debtor, was required to consider the existing circumstances and exercise its discretion as to whether a sale should be ordered and, if so, upon what terms and conditions. In addition to the circumstances hereinbefore set forth, upon which the power of the court to act was based, the following addi-

tional facts appear from the record. Debtor had by its petition invoked the jurisdiction of the court in a reorganization proceeding; about two years had elapsed since the filing of that petition, during which time no plan of reorganization had been submitted to the court but during which time heavy interest charges had accrued upon the debtor's loan for which the stock had been pledged; the secured creditors possessed a power of sale of the stock pledged which they were prevented from exercising by the pendency of the reorganization proceeding; proper notice of the proposed sale was given to all persons concerned; no creditor objected; an appraiser appointed by the court fixed the value of the stock at $775,521.64; Metals Disintegrating Co. had made an offer amounting to $803,150; Intelectron, Inc. had made a bid for the stock in the sum of $910,129.58 in cash; neither debtor nor Dyner, its sole stockholder, had made any bid; and the sale, if consummated at the price bid by Intelectron, would pay the secured creditors in full and leave a substantial balance for expenses of administration and general creditors.

In view of these circumstances the district court, in the exercise of its discretion, authorized the sale. We are not at liberty to substitute our discretion for that of the district court. *Frank* v. *Drinc-O-Matic, supra.* We should reverse the order appealed from only if we are satisfied that the court in entering it was guilty of an abuse of discretion.

The burden is on the debtor to establish an abuse of discretion. *Kimmel* v. *Crocker,* 72 F. 2d 599, at 601. It relies heavily upon the so-called Armstrong offer, contained in a letter to Dyner submitted at the referee's hearing of May 9, 1955. This letter suggested a loan by Armstrong to Marathon but required that it be evidenced by the debtor's note "and other instruments and agreements

containing such terms, conditions, interest rates and maturity as shall be mutually agreeable to you, Marathon, and Armstrong." It will be noted that not only is the nature of the "other instruments and agreements" left undefined, but also that the letter leaves unsettled such vital essentials as the terms, conditions, interest rates and maturity, postponing such matters to subsequent agreements, if any, among Dyner, debtor and Armstrong. Whether or not there would ever be a meeting of the minds on these important matters was on May 9, 1955 uncertain. Moreover, in a period of over two years in which the debtor's property and business had been in the bankruptcy court, this was the only suggestion which either it or Dyner had submitted to the court for ending the proceedings there. Debtor's counsel, although apparently imbued with a belief in the efficacy of the Armstrong offer, in this court characterized it rather weakly as "an offer of a loan which might have had the effect of allowing the debtor to continue as a going concern."

In view of these facts, we cannot find that the district court was guilty of an abuse of discretion in ordering that the sale to Intelectron be consummated.

For the reasons hereinbefore set forth, the order from which an appeal has been taken is

AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Thursday, December 22, 1955.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

In the Matter of
MARATHON FOUNDRY AND MACHINE CO.,
Debtor.

MARATHON FOUNDRY AND MACHINE CO.,
Appellant,
No. 11534 *vs.*
JOSEPH SCHWARTZ, ET AL., TRUSTEES, ETC.,
Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the Order or Decree of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Wednesday January 18, 1956.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

In the Matter of
MARATHON FOUNDRY AND MACHINE CO.,
Debtor.

MARATHON FOUNDRY AND MACHINE CO.,
Appellant,
No. 11534 *vs.*
JOSEPH SCHWARTZ, ET AL., TRUSTEES, ETC.,
Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause, be, and the same is hereby, DENIED.